

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**THE UNITED STATES of AMERICA, et al.,
ex rel. JULIE LONG,**

Plaintiffs,

V.

JANSSEN BIOTECH, INC.,

Defendant.

**Civil Action No.
16-12182-FDS**

**MEMORANDUM AND ORDER CONCERNING *IN CAMERA*
REVIEW OF DEFENDANT’S DOCUMENTS WITHHELD
ON THE BASIS OF ATTORNEY-CLIENT PRIVILEGE**

SAYLOR, C.J.

This is a *qui tam* action alleging that a pharmaceutical company unlawfully provided free services to physicians who prescribed its medications. Relator Julie Long sued defendant Janssen Biotech, Inc., a company that manufactures and sells Remicade and Simponi ARIA, two infusible medications used to treat various conditions. She contends that the services constituted kickbacks in violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), which in turn resulted in the payment of false claims in violation of the False Claims Act, 31 U.S.C. § 3729(a).

In connection with the ongoing discovery process, relator moved for an *in camera* review of approximately 300 documents that were withheld or redacted by defendant on the basis of attorney-client privilege. Relator contends that defendant had not sufficiently demonstrated that the documents at issue were privileged.

The Court granted the motion and conducted an *in camera* review of the challenged

documents. Although several of those documents are indeed privileged, others do not appear to be. Accordingly, and for the following reasons, defendant will be directed to produce the documents listed in Appendix A of this order. Entry of this order will, however, be stayed for 14 days to permit defendant an opportunity to seek a further stay pending interlocutory appellate review.

I. Analysis

The attorney-client privilege attaches to communications “(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” *Mississippi Pub. Employees’ Ret. Sys. v. Bos. Sci. Corp.*, 649 F.3d 5, 30 (1st Cir. 2011) (quoting *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002)). The privilege “protects ‘only those communications that are confidential and are made for the purpose of seeking or receiving legal advice,’” although the request for legal advice need not be explicit. *Lluberes v. Uncommon Prods., LLC*, 663 F.3d 6, 24 (1st Cir. 2011) (quoting *In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 22 (1st Cir. 2003)); *Lynx Sys. Devs., Inc. v. Zebra Enter. Sols. Corp.*, 2018 WL 1532614, at *4 (D. Mass. Mar. 28, 2018). The privilege applies when the client is a corporation and protects communications between its employees and counsel. *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981).

Here, several challenged documents reflect communications made between defendant’s employees and counsel for the purpose of seeking legal advice, either explicitly or implicitly. There is no question that those documents are privileged and thus not discoverable. However,

the privilege does not appear to extend to two categories of documents that were initially withheld or redacted.

First, multiple communications at issue were directed to, or shared with, third parties. In general, “disclosing attorney-client communications to a third party undermines the privilege” because it “destroys the confidentiality upon which the privilege is premised.” *Cavallaro*, 284 F.3d at 246-47; *Lluberes*, 663 F.3d at 24. The inclusion of external consultants, marketing agents, and advisors on emails—even those containing otherwise-privileged communications—will normally amount to a waiver of the attorney-client privilege as to those documents.

Defendant asserts that the challenged third-party communications are nonetheless privileged under the “functional-equivalent doctrine.” (ECF No. 449 at 15). Relying principally on an articulation of that doctrine by the *Lynx* court, defendant contends that “certain third-party agents of corporate entities, such as consultants, can be considered the ‘functional equivalent’ of corporate employees by virtue of their close connection to the corporate entity,” thereby “allow[ing] communications between such agents and corporate counsel to fall within the scope of [the privilege].” 2018 WL 1532614, at *2.

In determining whether a third party is sufficiently connected to the corporation such that the functional-equivalent doctrine applies, the *Lynx* court considered multiple factors, including (1) whether the third party had a longstanding relationship with the corporate client; (2) whether he or she interacted with the corporation’s employees on a daily basis; (3) whether he or she was “intimately involved in the single objective for which the company was created”; (4) whether he or she worked from the client’s office; (5) whether he or she was obligated to work exclusively for the company; and (6) whether he or she acted as the company’s sole representative at public events, such that “[t]here was no principled basis to distinguish [the consultant’s] role from that

of an employee.” *Id.* at *2-4 (citing *In re Bieter Co.*, 16 F.3d 929, 938 (8th Cir. 1994)). Here, defendant asserts that its third-party marketing agents and consultants acted as functional equivalents of its marketing and sales employees because they held the same types of roles and worked toward the same set of objectives. (ECF No. 449 at 15).

As the *Lynx* court noted, the First Circuit has not adopted the functional-equivalent doctrine. 2018 WL 1532614, at *4. This Court will nevertheless assume that under certain circumstances, third-party agents may essentially operate as employees, and that the disclosure to them of otherwise-privileged communications will not waive the privilege. That may be particularly plausible in the health-care, medical-device, and pharmaceutical industries, where the activities of the company may be subject to complex legal requirements; external agents and consultants may, in some circumstances, perform functions that are indistinguishable from those of employees.

However, the burden of showing that third-party communications are privileged “rests with the party asserting the privilege.” *See In re Keeper of the Records*, 348 F.3d at 21. Although defendant has asserted that its external advisors functioned as employees, it has provided minimal evidence, at best, to establish that the assertion is in fact true. *See Lynx*, 2018 WL 1532614, at *4 (noting that the party asserting attorney-client privilege must “provide [] affirmative factual support for its contention”). Defendant has not, for example, submitted affidavits attesting that its external advisors interacted with its employees on a daily basis; that they were obligated to work exclusively for defendant; that they operated from defendant’s offices; that they represented defendant in external contexts; or that they were essentially indistinguishable from its employees. And defendant has not identified any specific individuals who performed such roles.

In its opposition memorandum, defendant did provide brief excerpts from three employee deposition transcripts. Those employees testified that they worked with unidentified “external partners” who provided them with “strategic support and tactical support” and whose responsibilities at times were an “extension” of those assigned to defendant’s employees. (ECF No. 449 Ex. E, F, G). The excerpts certainly suggest that defendant’s employees worked closely with some external advisors on various projects. But close collaboration is not enough to invoke the functional-equivalent doctrine. It is incumbent on the party asserting the privilege to put forth sufficient evidence to demonstrate that specific third-party individuals did in fact function as employees at the relevant time, and defendant has not done so here. Accordingly, defendant will be directed to produce those communications that were disclosed to third parties, as set forth in Appendix A.

The second category of documents that do not appear to be privileged are email attachments. Attachments to email communications, standing alone, are not privileged unless the attachments themselves contain confidential communications intended to seek legal advice from counsel. Indeed, “attachments which do not, by their content, fall within the realm of the privilege cannot be privileged by merely attaching them to a communication with the attorney.” *America’s Growth Cap., LLC v. PFIP, LLC*, 2014 WL 1207128, at *3 (D. Mass. Mar. 24, 2014). That means, for example, that “attachments containing business, not legal information, cannot be privileged.” *Id.*

To be clear, an email sent to counsel seeking confidential legal advice is privileged, whether it contains an attached document or not. And it is true that the mere selection of a non-privileged document for disclosure to an attorney could, in some circumstances, implicate the privilege. But documents do not become privileged simply because they have been attached to

an email sent to counsel. And absent special circumstances, the discoverability of an attached document must be analyzed independently from that of the email communication.

Here, multiple documents that have been withheld or redacted are attachments to email communications with counsel. Some of those attachments are clearly privileged. For example, some of the attachments are draft memoranda containing legal advice, or requests for legal advice, that fall squarely within the scope of privileged communications.

The remaining attachments, however, are not independently privileged—that is, they do not themselves constitute an attorney-client communication. And as to those attachments, defendant has not demonstrated that they are otherwise privileged based on the context of the email communications to which they are attached. Nor has defendant established that the privilege analysis changes simply because the attachments at issue were previously listed on its privilege log. Accordingly, defendant will be directed to produce those email attachments that are not independently privileged, as set forth in Appendix A.

II. Conclusion

For the foregoing reasons, the Court finds that the documents listed in Appendix A of this order are not privileged, and that they are therefore discoverable. The production of documents compelled by this order will be stayed for 14 days (that is, until July 4, 2025) to permit defendant an opportunity to seek a further stay pending interlocutory appellate review.

So Ordered.

Dated: June 20, 2025

/s/ F. Dennis Saylor IV
F. Dennis Saylor IV
Chief Judge, United States District Court

APPENDIX A**I. Third-Party Communications**

Row	Privilege-Log Number	Starting Bates #	Ending Bates #
61		JANSSENBIO-021-00005555	JANSSENBIO-021-00005559
62		JANSSENBIO-021-00005562	JANSSENBIO-021-00005562
857	JANSSENBIO-PL_2-0000627		
858	JANSSENBIO-PL_2-0000628		
859	JANSSENBIO-PL_2-0000629		
860	JANSSENBIO-PL_2-0000630		
861	JANSSENBIO-PL_2-0000631		
939		JANSSENBIO-064-00010697	JANSSENBIO-064-00010698
1136	JANSSENBIO-PL_2-0000900		
1137	JANSSENBIO-PL_2-0000901		
1310	JANSSENBIO-PL_2-0001072		
1311	JANSSENBIO-PL_2-0001073		
1465		JANSSENBIO-064-00000990	JANSSENBIO-064-00000993
1957	JANSSENBIO-PL_2-0001691		
1961		JANSSENBIO-064-00002539	JANSSENBIO-064-00002540
1986	JANSSENBIO-PL_2-0001718		
1987	JANSSENBIO-PL_2-0001719		
1988	JANSSENBIO-PL_2-0001720		
2119	JANSSENBIO-PL_2-0001850		
2120	JANSSENBIO-PL_2-0001851		
2125	JANSSENBIO-PL_2-0001856		
2895	JANSSENBIO-PL_2-0002609		
3156	JANSSENBIO-PL_2-0002868		
3605	JANSSENBIO-PL_2-0003306		
4102	JANSSENBIO-PL_2-0003791		
4284		JANSSENBIO-017-00052328	JANSSENBIO-017-00052329
4322		JANSSENBIO-063-00001583	JANSSENBIO-063-00001660

II. Email Attachments

Row	Privilege-Log Number
9	JANSSENBIO-PL_2-0000003
10	JANSSENBIO-PL_2-0000004
11	JANSSENBIO-PL_2-0000005
12	JANSSENBIO-PL_2-0000006
13	JANSSENBIO-PL_2-0000007
14	JANSSENBIO-PL_2-0000008
15	JANSSENBIO-PL_2-0000009
16	JANSSENBIO-PL_2-0000010
17	JANSSENBIO-PL_2-0000011
18	JANSSENBIO-PL_2-0000012
19	JANSSENBIO-PL_2-0000013
20	JANSSENBIO-PL_2-0000014
21	JANSSENBIO-PL_2-0000015
22	JANSSENBIO-PL_2-0000016
114	JANSSENBIO-PL_2-0000089
115	JANSSENBIO-PL_2-0000090
116	JANSSENBIO-PL_2-0000091
117	JANSSENBIO-PL_2-0000092
156	JANSSENBIO-PL_2-0000121
157	JANSSENBIO-PL_2-0000122
201	JANSSENBIO-PL_2-0000157
202	JANSSENBIO-PL_2-0000158
203	JANSSENBIO-PL_2-0000159
204	JANSSENBIO-PL_2-0000160
205	JANSSENBIO-PL_2-0000161
206	JANSSENBIO-PL_2-0000162
211	JANSSENBIO-PL_2-0000167
372	JANSSENBIO-PL_2-0000313
373	JANSSENBIO-PL_2-0000314
374	JANSSENBIO-PL_2-0000315
375	JANSSENBIO-PL_2-0000316
376	JANSSENBIO-PL_2-0000317
451	JANSSENBIO-PL_2-0000391
452	JANSSENBIO-PL_2-0000392
658	JANSSENBIO-PL_2-0000504
761	JANSSENBIO-PL_2-0000570
1523	JANSSENBIO-PL_2-0001267
1524	JANSSENBIO-PL_2-0001268

1525	JANSSENBIO-PL_2-0001269
1526	JANSSENBIO-PL_2-0001270
1527	JANSSENBIO-PL_2-0001271
1528	JANSSENBIO-PL_2-0001272
1529	JANSSENBIO-PL_2-0001273
1530	JANSSENBIO-PL_2-0001274
1531	JANSSENBIO-PL_2-0001275
1657	JANSSENBIO-PL_2-0001399
1658	JANSSENBIO-PL_2-0001400
1744	JANSSENBIO-PL_2-0001485
1745	JANSSENBIO-PL_2-0001486
1746	JANSSENBIO-PL_2-0001487
1747	JANSSENBIO-PL_2-0001488
1748	JANSSENBIO-PL_2-0001489
1781	JANSSENBIO-PL_2-0001521
1782	JANSSENBIO-PL_2-0001522
1783	JANSSENBIO-PL_2-0001523
1784	JANSSENBIO-PL_2-0001524
1785	JANSSENBIO-PL_2-0001525
1786	JANSSENBIO-PL_2-0001526
1788	JANSSENBIO-PL_2-0001528
1789	JANSSENBIO-PL_2-0001529
1791	JANSSENBIO-PL_2-0001531
1792	JANSSENBIO-PL_2-0001532
1793	JANSSENBIO-PL_2-0001533
2065	JANSSENBIO-PL_2-0001796
2066	JANSSENBIO-PL_2-0001797
2067	JANSSENBIO-PL_2-0001798
2068	JANSSENBIO-PL_2-0001799
2120	JANSSENBIO-PL_2-0001851
2183	JANSSENBIO-PL_2-0001913
2584	JANSSENBIO-PL_2-0002313
2585	JANSSENBIO-PL_2-0002314
2586	JANSSENBIO-PL_2-0002315
2587	JANSSENBIO-PL_2-0002316
2588	JANSSENBIO-PL_2-0002317
2589	JANSSENBIO-PL_2-0002318
2590	JANSSENBIO-PL_2-0002319
2591	JANSSENBIO-PL_2-0002320
2592	JANSSENBIO-PL_2-0002321

2593	JANSSENBIO-PL_2-0002322
2594	JANSSENBIO-PL_2-0002323
2595	JANSSENBIO-PL_2-0002324
2962	JANSSENBIO-PL_2-0002676
3081	JANSSENBIO-PL_2-0002795
3083	JANSSENBIO-PL_2-0002797
3084	JANSSENBIO-PL_2-0002798
3086	JANSSENBIO-PL_2-0002800
3087	JANSSENBIO-PL_2-0002801
3664	JANSSENBIO-PL_2-0003354
3665	JANSSENBIO-PL_2-0003355
3754	JANSSENBIO-PL_2-0003443
3755	JANSSENBIO-PL_2-0003444
3756	JANSSENBIO-PL_2-0003445
3757	JANSSENBIO-PL_2-0003446
3758	JANSSENBIO-PL_2-0003447
3759	JANSSENBIO-PL_2-0003448
3776	JANSSENBIO-PL_2-0003465
3777	JANSSENBIO-PL_2-0003466
3778	JANSSENBIO-PL_2-0003467
3779	JANSSENBIO-PL_2-0003468
3952	JANSSENBIO-PL_2-0003641
4070	JANSSENBIO-PL_2-0003759
4071	JANSSENBIO-PL_2-0003760
4103	JANSSENBIO-PL_2-0003792
4104	JANSSENBIO-PL_2-0003793
4105	JANSSENBIO-PL_2-0003794
4106	JANSSENBIO-PL_2-0003795
4107	JANSSENBIO-PL_2-0003796
4108	JANSSENBIO-PL_2-0003797
4109	JANSSENBIO-PL_2-0003798
4110	JANSSENBIO-PL_2-0003799
4111	JANSSENBIO-PL_2-0003800
4112	JANSSENBIO-PL_2-0003801
4113	JANSSENBIO-PL_2-0003802
4114	JANSSENBIO-PL_2-0003803
4115	JANSSENBIO-PL_2-0003804
4116	JANSSENBIO-PL_2-0003805
4117	JANSSENBIO-PL_2-0003806
4118	JANSSENBIO-PL_2-0003807

4119	JANSSENBIO-PL_2-0003808
4120	JANSSENBIO-PL_2-0003809
4121	JANSSENBIO-PL_2-0003810
4122	JANSSENBIO-PL_2-0003811
4123	JANSSENBIO-PL_2-0003812
4124	JANSSENBIO-PL_2-0003813
4125	JANSSENBIO-PL_2-0003814
4126	JANSSENBIO-PL_2-0003815
4127	JANSSENBIO-PL_2-0003816
4128	JANSSENBIO-PL_2-0003817
4129	JANSSENBIO-PL_2-0003818
4130	JANSSENBIO-PL_2-0003819
4131	JANSSENBIO-PL_2-0003820
4132	JANSSENBIO-PL_2-0003821
4335	JANSSENBIO-PL_2-0003957
4352	JANSSENBIO-PL_2-0003973